

### REMARKS

The as-filed abstract has been replaced to avoid Examiner's objection to the single sentence claim structure.

Claims 1-39, and 41-42 are pending. Claims 40, 43, and 44 have been cancelled or withdrawn.

The undersigned is appreciative of the Examiner's conclusion that claims 13,14,19-21 and 25-37 are allowable if rewritten in independent form and amended to overcome section 112, second paragraph issues.

Applicants have amended each pending independent claim to further describe the guide as follows: "wherein the guide is a non-cutting centering device adapted to center the chisel within the disc space so that equal amounts of bone are removed from each endplate by the shaving portions as the chisel moves through the disc space."

Support for this amendment is provided at page 8, lines 8-14 of the as-filed specification, which reads as follows:

Still referring to Figure 8, preferably, the head portion 27 of the guide extends further distally than the shaving portions. In this condition, the head 27 acts as a centering device which insures that the equal depth of bone is shaved from each adjacent endplate. More preferably, head 27 possesses upper and lower lands 20 which help stabilize the device as it moves through the disc space and assists in the centering function. Preferably, at least a portion of each the lands is positioned distal to the tips, 15, 17 of the shaving portions 14,16. These leading portions further stabilize the device upon its initial entry into the disc space, and prevent clogging.

Further support for this amendment is provided at page 8, lines 24-28 of the as-filed specification, which reads as follows:

Now referring to Figure 10, the general function of the guide 24 is to insure that the device is centered within the disc space so that equal

amounts of bone are removed from each endplate. When the guide is centered between the shaving portions (i.e., its midpoint M is located between the 40% and 60% of the distance from edges Y and Z), substantially equal amounts of bone are removed from each endplate.

Since the term "guide" is found in the juxtaposition with the term "shaving portions" in the above passages, the skilled artisan would recognize the non-cutting nature of the guide.

Further support for the "non-cutting" aspect of the amendment is found in the head shapes of Figure 11 (nipple shape), Figure 12 (bullet shape) and Figure 13 (circular).

**The Examiner has rejected claims 1-12, 15, 18, 22-24 and 38-44 pursuant to 35 USC 102(a) as being anticipated by US Patent No. 5,649,945 (Ray et al.). In the Final Rejection, the Examiner stated the need for clarification of the term "guide":**

In response to the present rejection applicant argues Ray et al fails to disclose a "guide" and then declares that a guide is a non-cutting member that helps align the chisel if the chisel were somehow misaligned, thereby insuring that equal amounts of material are removed from the upper and lower workpiece portions." Unfortunately, the rejected claims fail to include such defining language. The examiner would readily withdraw the present rejection if such language were included in the claim.

Applicants have amended independent claims 1, 37, 41 and 42 to recite a non-cutting guide adapted to center the chisel within the disc space so that equal amounts of bone are removed from each endplate by the shaving portions as the chisel moves through the disc space, as suggested by the Examiner. Accordingly, the Ray rejection should be withdrawn in view of these claims.

Since claims 43 and 44 have been cancelled, the Examiner's anticipation rejection of these claims in view of Ray is now moot.

**Claim 43 was rejected under 35 USC 102(e) as being anticipated by Nicholson.**

Since claims 43 and 44 have been cancelled, the Examiner's rejection of these claims in view of Nicholson is now moot.

**Claim 44 was rejected under 35 USC 102(e) as being anticipated by Japanese patent 210316.**

Since claim 44 has been cancelled, the Examiner's rejection of these claims in view of Japanese patent 210316 is now moot.

**Claims 16-17 were rejected under 35 USC 103 as being obvious over Ray.**

Since claims 16 and 17 depend from claim 1, and claim 1 is patentable over Ray, these dependent claims should be patentable as well.

Applicants believe that inventorship remains the same as in the as-filed case.

In addition, please provide any extensions of time which may be necessary and charge any fees which may be due to Deposit Account No. 10-0750, but do not include any payment of issue fees.

Should there be any remaining or further questions, the Examiner is requested to place contact the undersigned directly.

Respectfully submitted,

*Thomas M. DiMauro*

Thomas M. DiMauro  
Attorney for Applicants  
Reg. No. 35,490  
DePuy Spine  
325 Paramount Drive  
Raynham, MA 02767  
(508) 880-8401